STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE MORENCY,

Defendant-Appellant.

UNPUBLISHED
May 15, 2003

No. 238358
St. Clair Circuit Court
LC No. 01-000848-FH

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

A jury found defendant guilty of one count of driving with a suspended license and causing death, MCL 257.904(4), and three counts of driving with a suspended license and causing serious injury, MCL 257.904(5). The trial court sentenced defendant, as an habitual offender, second offense, MCL 769.10, to concurrent terms of imprisonment of 7 to 22½ years for the former conviction, and 3 to 7½ years for each of the latter convictions. Defendant appeals as of right. We affirm.

This case arises from a traffic accident that occurred on November 11, 2000. According to the evidence, defendant, while driving a pickup truck on the Marine City Highway, collided with a white Chrysler. Harold Sharrow, the driver of the Chrysler, was killed in the accident, and Suzanne Kaminski, Travis Sharrow, and Michelle Sharrow, all passengers in that vehicle, were seriously injured.

I

Defendant first argues that the trial court erred in denying his motion to dismiss predicated on the destruction of the motor vehicles involved in the accident. We disagree. "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998).

A criminal defendant has a constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984), citing US Const, Ams VI and XIV, and Const 1963, art 1, §§ 13, 17, 20. A defendant seeking appellate relief on the ground that his or her due process rights were violated because the police failed to preserve certain evidence "bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

In ruling that defendant had failed to show bad faith, the trial court observed that the police released both vehicles "nearly 5½ months after the collision," which defendant does not dispute, and that the defense thus "had ample opportunity to examine the vehicles during this time."

The duty of the police to preserve evidence of potential use to a suspect is not absolute. See *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *California v Trombetta*, 467 US 479, 488; 104 S Ct 2528; 81 L Ed 2d 413 (1984). "To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489 (citation omitted).

Although defendant argues that the evidence in question "was necessary to completely exculpate Defendant," he explains neither his failure to take advantage of this supposedly vital evidence during the several months when it was available, nor precisely how the particular damage to those vehicles, as revealed by the wreckage, could have constituted exculpatory evidence. Instead, defendant only asserts generally that his theory of the case differed from that of the prosecutor, and that examination of the wreckage would have supported his version. The differences between the parties' theories in fact tended to focus on whether defendant was intoxicated at the time,[1] or the reasons behind the suspension of his license.[2] However, we note that defendant testified that he did not cause the crash in question, maintaining instead that, while he was driving his truck, the other car "had come up from the side of the road, from the tree line," and struck him on the passenger side of his vehicle. Perhaps defendant wishes to imply that the actual collision damage to the vehicles would have tended to show that the Chrysler struck the truck, instead of the other way around, but defendant's failure to make this assertion while presenting this issue, or any other basis for his argument that the wrecked vehicles constituted exculpatory evidence, is fatal to this claim of error. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Further, it is not apparent that any such evidence could fairly be characterized as exculpatory. Exculpatory evidence is that which "extrinsically tends to establish defendant's innocence of crimes charged as differentiated from that which, although favorable, is merely collateral or impeaching." Black's Law Dictionary (6th ed, 1990), p 566 (citation omitted). An eyewitness testified that the Chrysler was in its own lane when the nearly head-on crash occurred, and had not been weaving or otherwise proceeding erratically beforehand. The eyewitness' testimony that the collision took place in the Chrysler's lane implicates defendant as

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[1] Defendant was charged with, but acquitted of, driving while under the influence of a controlled substance and causing death or serious injury, MCL 257.625(4) and (5).

[2] Both subsections (4) and (5) of MCL 257.904 provide that they do not apply "to a person whose operator's . . . license was suspended because that person failed to answer a citation or comply with an order or judgment pursuant to [MCL 257.321a]."

the errant driver, and this would hold even if examination of the wreckage revealed that the Chrysler struck the side of defendant's truck.

Moreover, a police investigator testified that his findings at the scene comported with the eyewitness' version of events. The investigator added that skid marks from the Chrysler indicated that it was "being driven slightly off to the shoulder of the road." According to the witness, he reached his conclusions from examining "the crushed damage, final resting point of vehicles, the skid mark . . . on the roadway, [and] the scar's [sic] on the roadway," and felt no need to examine the vehicles themselves further while they were in storage.

From this record, we conclude that defendant has failed to show either that the police acted in bad faith by failing to preserve the wreckage for more than 5½ months, or that the wreckage of the two vehicles constituted exculpatory evidence. This claim of error must fail. *Johnson, supra.*

II

Defendant's remaining issue on appeal concerns the trial court's decision not to instruct the jury on the lesser offense of negligent homicide, and on gross negligence as an element of driving with a suspended license. A criminal defendant has a right to have a properly instructed jury. MCL 768.29. See also *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967). Instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Defendant urged the trial court to provide an instruction on negligent homicide, MCL 750.324, as a cognate lesser included offense of both driving while under the influence of a controlled substance and causing death, and driving with a suspended license and causing death. The trial court properly denied the request.

As an initial matter, we observe that defendant was acquitted of driving while under the influence of a controlled substance and causing death, and that defendant fails to explain how, in light of that development, he was unfairly prejudiced for want of an instruction on a lesser offense in that regard. This argument warrants no further consideration. This leaves the question of the propriety of denying an instruction on negligent homicide as a lesser offense of driving with a suspended license and causing death.

A necessarily included lesser offense is one all of whose elements are also elements of the greater offense, such that it is impossible to commit the greater without also committing the lesser. *People v Bailey*, 451 Mich 657, 667; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). A cognate lesser offense, however, shares some, but not all, elements with the greater offense, and includes elements not found in the greater offense. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). A requested instruction on a necessarily included lesser offense, that comports with a rational view of the evidence, must be provided. *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002), citing MCL 768.32(1). However, an instruction

on a cognate lesser included offense is not permitted. *Id.*[3] See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

Defendant concedes that negligent homicide is a cognate lesser offense for present purposes, and rightly so. The elements of negligent homicide include death resulting from negligence that is not wilful or wanton, in other words ordinary negligence. MCL 750.324; *People v Paulen*, 327 Mich 94, 98-100; 41 NW2d 488 (1950). In contrast, driving with a suspended license and causing death does not require negligence. Intent for purposes of MCL 257.904(4) consists of driving while knowingly lacking a valid license. See *City of Troy v McMaster*, 154 Mich App 564, 571-572; 398 NW2d 469 (1986), citing MCL 257.904(1) and (4). The statute sets forth no intent element in connection with causing death while doing so. Because negligence is an element of negligent homicide, but not of driving with a suspended license and causing death, the former is a cognate lesser offense of the latter. Because instructions on cognate lesser offenses may not be given, an instruction on negligent homicide in this instance would have been error. *Cornell, supra*; *Reese, supra*.

Because driving with a suspended license and causing death includes no negligence element, the trial court properly declined to instruct the jury that gross negligence was required to convict of that crime. For these reasons, defendant's claims of instructional error must fail.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

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[3] Because this case was pending on appeal when *Cornell* was decided and defendant requested an instruction on negligent homicide, thus preserving this issue for appeal, *Cornell* applies here. See *Cornell, supra* at 367.